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Attorneys for Defendants

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA**

2-WAY COMPUTING, Inc. a Nevada
corporation,

Plaintiff,

v.

SPRINT SOLUTIONS, INC., a Delaware
corporation; NEXTEL FINANCE COMPANY,
a Delaware corporation; SPRINT UNITED
MANAGEMENT COMPANY, a Kansas
corporation; NEXTEL OF CALIFORNIA, INC.,
a Delaware corporation; NEXTEL BOOST OF
CALIFORNIA, LLC, a Delaware limited
liability company, and NEXTEL
COMMUNICATIONS, INC., a Delaware
corporation,

Defendants.

AND RELATED COUNTERCLAIM

Case No. 2:11-cv-00012-JCM-PAL

**DEFENDANTS' NOTICE OF
SUPPLEMENTAL AUTHORITY
REGARDING DEFENDANTS'
MOTION TO EXCLUDE THE
TESTIMONY OF MICHELE M.
RILEY**

1 Defendants Sprint Solutions, Inc., Nextel Finance Company, Sprint United
2 Management Company, Nextel of California, Inc., Nextel Boost of California, LLC, and
3 Nextel Communications, Inc. (collectively “Sprint”) hereby notify the Court of the Eastern
4 District Court of Virginia’s recent decision in *Intelligent Verification Systems, LLC v.*
5 *Microsoft Corporation, et. al.*, Case No. 2-12-cv-00525 (E.D. Va. Mar. 31, 2015), attached
6 hereto as Exhibit A. This decision is relevant to Defendants’ Motion to Exclude the
7 Testimony of Michele M. Riley, Dkt. No. 181 (“Motion”).

8 In the Motion, Defendants detailed how Ms. Riley’s failed to properly apportion any
9 value to the patented features, instead relying on her assumption that the patent covers the
10 entirety of Push-To-Talk (“PTT”). Motion at 8-12; *see also* Defendants’ Reply in Support of
11 Motion to Exclude the Testimony of Michele M. Riley, Dkt. No. 198, at 2-4 (“Reply”). As
12 explained by the Eastern District Court of Virginia in *Intelligent Verification Systems*, such
13 failure to apportion is fatal to any damages analysis:

14 IVS argued that further apportionment for the value of the
15 patented feature, beyond identification of the necessary
16 hardware components, was not required. Although IVS cited
17 large portions of the Federal Circuit’s holding in *Virnetx, Inc. v.*
18 *Cisco Systems, Inc.*, 161 F.3d 1308 (Fed. Cir. 2014) in its brief,
19 IVS’s attempt to distinguish *Virnetx* is not readily apparent.
20 IVS seems to distinguish *Virnetx* on its facts, arguing that “[i]n
21 *Virnetx*, the patents in suit had system and method claims that
22 did not recite component hardware parts like the entertainment
23 device, acquisition device, and processor.” ECF No. 371 at 19.
24 IVS also argued that “further apportionment beyond removal of
25 the ‘non-infringing components’ from the accused products is
26 not a requirement imposed by *Virnetx* or any other legal
27 authority cited by Defendants.” *Id.* at 21. However, these
28 arguments fail to rebut the plain language of *Virnetx*:
“Where the smallest salable unit is, in fact, a multi-component
product containing several non-infringing features with no
relation to the patented feature ... the patentee must do more to
estimate what portion of the value of that product is attributable
to the patented technology. To hold otherwise would permit the
entire market value exception to swallow the rule of
apportionment.” 767 F.3d at 1327-28. Although Mr. Bratic did
apportion out those hardware components not required to
practice the patented feature, he did not properly apportion any
value to the necessary hardware components. Indeed, a
processor has “several non-infringing features with no relation

to the patented feature,” *id.* at 1327, yet Mr. Bratic attributed 100% of the processor to the apportioned royalty base. IVS could not plausibly argue that the processor does not have any other function besides practicing the patented feature, but that is exactly what Mr. Bratic’s apportionment signifies. His failure to identify the value of those necessary hardware components renders his opinion flawed and directly contrary to the Federal Circuit’s provision in *Virnetx*. Moreover, Mr. Bratic’s value determination based on comparing the costs of the necessary hardware components to practice the patented technology and the total cost of the accused product also fails to properly consider the value of the patented feature. This calculation still ties the alleged “value” to the necessary hardware components, not the value of the patented feature. Under *Virnetx*, Mr. Bratic was barred from ascribing all of the value of the patented feature to a multi-component product like a processor.

...

Finally, IVS’s argument that Mr. Bratic failed to apportion the value of the patented feature because Defendants did not provide adequate usage data is meritless. Regardless of whether Defendants provided usage data, it was IVS’s burden to apportion the value of the patented feature to substantiate its damages claim. *See e.g., VirnetX*, 161 F.3d at 1329 (“VirnetX cannot simply hide behind Apple’s sales model to avoid the task of apportionment.”); *LaserDynamics*, 694 F.3d at 70 (holding that there is no “necessity-based exception to the entire market value rule”). Moreover, Mr. Bratic did not cite any lack of usage data in his analysis; rather, his “value” apportionment was based on the cost of the necessary hardware components as compared to the total cost of the accused product. Accordingly, the undersigned finds that Mr. Bratic improperly apportioned the royalty base by failing to apportion the value of the patented feature beyond his identification of the SSPPU [smallest salable patent-practicing unit].

Intelligent Verification Systems, at 17, 19 (emphasis added).

Ms. Riley also improperly relied on non-comparable licenses. Motion at 13-14; *see also* Reply at 4-7. Again, as the Court in *Intelligent Verification Systems* explained, reliance on such non-comparable licenses is improper:

Not only was Mr. Bratic’s reliance on the Immersion/Sony verdict and license as a comparable license improper, Mr. Bratic also incorrectly relied on thirteen Microsoft licenses to

1 support the form of his royalty under *Georgia-Pacific* Factor
2 No. Two. ECF No. 322, attach. 10 at 36. Mr. Bratic admitted
3 that none of these agreements involved comparable technology,
4 but proffered them simply to support his finding that the
5 hypothetical negotiation would produce a running royalty, as
6 opposed to a lump sum payment. *Id.* The Northern District of
7 California recently rejected a similar opinion in *TV Interactive*
8 *Data Corp. v. Sony Corp.*, 929 F. Supp. 2d 1006 (N.D. Cal.
9 Mar. 11, 2013). There, the expert cited agreements that were
10 “not for technologies directly comparable” to prove that “Sony
11 has agreed to pay running royalties ranging from \$0.01 to \$0.25
12 per unit.” *Id.* at 1015. Because the expert admitted that the
13 technologies were not comparable, the court excluded him from
14 referencing them, even though he proposed to only use them to
15 note that they supported his royalty rate. *Id.* Mr. Bratic attempts
16 to do the same thing as the expert in *TV Interactive Data Corp.*
17 He admits the technologies are not comparable, even though
18 Factor No. Two is addressed to “[t]he rates paid by the licensee
19 for the use of other patents *comparable* to the patent-in-suit.”
20 ECF No. 322, attach. 10 at 36. **Though Mr. Bratic proposes to**
21 **use the licenses simply to support the form of the royalty,**
22 **the Federal Circuit has specifically rejected reliance on**
23 **technologically noncomparable licenses under *Georgia-***
24 ***Pacific* Factor. No. Two.** *See, e.g., Lucent*, 580 F.3d at 1326-
25 28.

16 *Intelligent Verification Systems*, at 14 (emphasis added).

1 Dated: April 10, 2015

Respectfully submitted,

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3 **STOCKTON LLP**

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Company, Sprint United Management
Company, Nextel of California, Inc., Nextel
Boost of California, LLC, and Nextel
Communications, Inc.

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years. On this date, I caused to be served a true and correct copy of the foregoing **DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY REGARDING DEFENDANTS' MOTION TO EXCLUDE THE TESTIMONY OF MICHELE M. RILEY** by the method indicated:

<u>XXX</u>	by the Court's CM/ECF Program
_____	by U. S. Mail
_____	by Facsimile Transmission
_____	by Electronic Mail
_____	by Federal Express
_____	by Hand Delivery

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DATED: April 10, 2015

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